No. 03-286

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2003

STATE OF ARIZONA, Petitioner,

v.

KEITH ROYAL PHILLIPS, Respondent.

Brief in Opposition to
Petition for a Writ of Certiorari to the
Supreme Court of Arizona

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that, if certiorari were granted, this case would present the following questions:

1. Whether this Court has jurisdiction to review the Arizona Supreme Court's state law based criminal procedure decision below.

2. Whether the Arizona Supreme Court violates federal law by choosing to order resentencings in capital cases in which constitutional error occurred at the sentencing phase, an alternative left open to the States by this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990).

3. Whether a complete denial of the right to jury trial on sentence enhancing factors, recognized by this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), is structural error that cannot be held harmless.

4. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), extends to eligibility factors that involve convictions for other criminal conduct.

5. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), applies to eligibility factors that involve a balancing and qualitative assessment of aggravating circumstances.

6. Whether judge only capital sentencing violates the Sixth, Eighth or Fourteenth Amendments.

7. Whether resentencing is still required where the unconstitutional finding of one aggravating factor was not, and could not be, deemed harmless.

8. Whether the Eighth Amendment principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), permit state courts to disregard evidence of mitigating circumstances because they were arguably not shown, by a preponderance of the evidence, to have caused the crime.

9. Whether, consistent with the Sixth, Eighth, and Fourteenth Amendments, the Arizona Supreme Court could have reaffirmed Respondent's death sentence without allowing the merits of his individual case to be argued or presented in any fashion.

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JURISDICTION

Respondent contests this Court's jurisdiction over the Question Presented For Review in the certiorari petition, and also over the state law questions the Petition seeks to raise for the reasons set forth below.

The Question Presented For Review by the State is:

> **Did the Arizona Supreme Court err holding that *Ring II* requires not only a jury determination of an aggravating factor rendering the defendant eligible for the death penalty, but also a jury determination of mitigating circumstances and whether mitigating circumstances are sufficiently substantial to warrant leniency? (Emphasis Added.)**

Respondent argues in the Petition that the answer to this Question is "yes", and that the Arizona Supreme Court erroneously held in *State v. Ring*, 65 P.3d 915 (2003)("hereinafter "*Ring III*"), that this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), (hereinafter "*Ring II*"), requires jury determination of mitigating circumstances as well as the aggravating factors required to render a defendant eligible for the death penalty. (Pet. For Cert. at 7-8, 10.) Petitioner specifically argues that:

> **The Arizona Supreme Court held in the instant case that under *Ring II*, there is a Sixth Amendment right to a jury determination of whether mitigating circumstances exist and whether those circumstances are sufficient substantial to warrant leniency. *Phillips*, 67 P.3d 1228 at ¶¶13-15.**

(Id. at 8.) The Question Presented For Review is therefore based on the predicate factual issue of whether the Arizona Supreme Court in fact held in *Ring III* that *Ring II* requires a jury to determine the existence of mitigating circumstances. To support its position, Petitioner cites *Ring III*, *supra*, *at 204 Ariz. 534 at* ¶¶ 50, 63, 88-89 and *State v. Phillips*, 67 P.3d 1228, 1231-1232, ¶¶13-15 Ariz. 2003. (hereinafter "*Phillips II*"). These cases, however, do not in any way support its contention that the Arizona Supreme Court has held

that *Ring II* requires a jury trial for mitigating circumstances. Fairly read, those sections hold only that the harmless error analysis adopted by the Arizona Supreme Court in *Ring III* requires consideration of the mitigating circumstances of each defendant's case, not that *Ring II* requires a jury to determine the existence of mitigating circumstances. Id.[1] Thus, Petitioner's contention that the Arizona Supreme Court held in *Ring III and Phillips II*, *supra*, that this Court held in *Ring II* that a jury must determine the existence of mitigating circumstances is clearly incorrect. Since the Question For Review is entirely based on that erroneous factual premise, the Question is not a *bona fide* question for this Court's certiorari review, and the Petition should be denied.

Moreover, even assuming *arguendo* that Petitioner has presented a *bona fide* federal question for certiorari review, this Court should still deny the Petition, because Petitioner's request for review of this issue is untimely. Rule 13(1) of the Rules of the Supreme Court of the United States requires a petition for writ of certiorari to be filed within 90 days of judgment or denial of discretionary review by the state court of last resort. A petition which is "jurisdictionally out of time will not be filed by this Court." Rule 13(2), Supreme Court Rules. Petitioner contends that the Arizona Supreme Court held in *Ring III* that *Ring II* requires jury determination of mitigating circumstances. Assuming that this contention is correct (which it is not), the legal issue of whether *Ring II* requires jury determination of mitigating circumstances, as well as aggravating circumstances, is a legal issue that was ripe for judicial review by this Court on April 3, 2003, the date that *Ring III*

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[1] As stated in detail *infra*, the Arizona Supreme Court's consideration of mitigating circumstances in its harmless error analysis adopted in *Ring III* is entirely consistent with this Court's decision in *Clemons v. Mississippi*, 454 U.S. 738 (1990).

was decided by the Arizona Supreme Court. Whether a legal issue is ripe for judicial resolution under Article III of the United States Constitution is based upon an evaluation of:

> **both the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration.**

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1997). In *United States v. Quinones*, 313 F.3d 49, 56-60 (2nd Cir. 2002), the court applied the *Abbott* test, *supra*, to the issue of whether an appeal of a pretrial challenge to the facial constitutionality of the Federal Death Penalty Act was ripe. The court held the pretrial challenge was ripe for judicial appellate review under Article III because (i) the issue of the constitutionality of the statute was a "pure question of law" and (ii) a defendant charged under the statute would be subject to hardship and "suffer[] practical and legally-cognizable disadvantages" if resolution of the issue were postponed. *Quinones*, *supra*, 313 F.3d at 58-59.[2]

Based on these principles, the issue raised by Petitioner was ripe for appellate review on April 3, 2003 when *Ring III* was decided. The issue of whether *Ring II* requires jury determination of mitigating circumstances is a pure question of constitutional law which was fit for judicial resolution on April 3, 2003. *Abbott Laboratories*, *supra*, 387 U.S. at 148-149; *Quinones*, *supra*, 313 F.3d at 59. In addition, the delay by Petitioner in requesting this Court to review this issue has caused substantial hardship to defendants, like Respondent, whose cases have already been remanded for jury sentencings after decisions by the Arizona Supreme Court finding that the *Ring II* errors in their cases were not

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[2] Specifically, the court held that postponement of the resolution of the issue would impact *inter alia* the defendant's decision of whether to plead guilty and also the defendant's tactical decisions during voir dire and the trial itself. *Id.* at 59.

harmless" under the methodology set out in *Ring II*.[3] Ten other defendants are in the pre-decision phase of their direct appeals and have not yet undergone the harmless error analysis adopted by the Arizona Supreme Court in *Ring III*. It is certain that all of these defendants have already made legal, tactical and other important decisions in their cases based upon *Ring II*, *Ring III* and the revised versions of §13-703, §13-703.01, et seq. See *Quinones*, *supra*, 313 at 56-60. Delayed consideration by this Court of the untimely Question Presented by Petitioner will cause confusion, chaos and prejudice in the cases of Respondent and the other *Ring III* defendants, as well as the rest of the Arizona capital system, and Petitioner's untimely request for certiorari review should be rejected.

Respondent's opposition to Petitioner's claim of jurisdiction in this Court therefore can be summarized as follows. The Question Presented requests certiorari review by this Court of the legal issue of whether *Ring II* requires jury determination of mitigating circumstances and whether the Arizona Supreme Court held that to be the law in *Ring III*, which was decided on April 3, 2003. For the reasons set forth above, that Question was ripe for appellate review and resolution on April 3, 2003, and Petitioner's Petition should therefore have been filed within 90 days of that date, which was July 2, 2003. Petitioner did not file its Petition, however, until August 4, 2003, and the Petition is therefore untimely

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[3] *Phillips II*, *supra*; *State v. Dann*, 74 P.3d 231 (2003); *State v. Lamar*, 72 P.3d 831 (2003); *State v. Jones (Antoin)*, 72 P.3d 1264 (2003); *State v. Canez*, 74 P.3d 932 (2003); *State v. Prince*, 75 P.3d 114 (2003), *State v. Ring*, 2003 WL 22064328 (filed September 5, 2003); *State v. Cropper*, 2003 WL 22064329 (filed September 5, 2003); *State v. Rutledge*, 2003 WL 2213345 (filed August 16, 2003); *State v. Pandeli*, 65 P.3d __ Ariz. (2003); *State v. Prasertphong*, 2003 WL 22039960 (filed September 2, 2003); *State v. Tucker*, 68 P.3d 110 (2003); *State v. Lehr*, 205 Ariz. 7, 68 P.3d 50 (2003); *State v. Harrod*, 204 Ariz. 567, 65 P.3d 948 (2003); *State v. Finch*, 68 P.3d 123 (2003); *State v. Prince*, 75 P.3d 148 (2003).

under Rule 13(1) of this Court. *See United States v. Kress*, 58 F.3d 370, 373-374 (8th Cir. 1995)(appellate issues waived because not raised when issues first became ripe in original appeal). Since the Petition is untimely, Respondent requests this Court to dismiss it pursuant to Rules 13(1) and (2) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those authorities set forth in the Petition, this case involves the Tenth Amendment to the Constitution of the United States, which provides:

> **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.**

This case also involves A.R.S. §§ 13-703 and 13-703.01, copies of which are set forth in Appendix A.

STATEMENT OF THE CASE

1. Arizona Capital Punishment Law After *Ring v. Arizona*

Immediately after this Court's *Ring* decision, the Arizona legislature was convened in special session to enact a new death sentencing statute. That statute was expressly made applicable to all cases in which direct appeal had not been finally resolved. 2002 ARIZ. SESS. LAWS, 5th S.S., Ch.1, § 7(A). The statute provided for a jury determination of all issues relating to guilt and sentence: defendant's guilt of first degree murder, the presence of aggravating circumstances, and the existence of sufficient mitigating circumstances to outweigh the aggravating circumstances. A.R.S. § 13-703.01.

Shortly thereafter, the Arizona Supreme Court consolidated all capital cases before it on direct appeal, including Mr. Phillips', for argument in *Ring III*. In its decision in that case, the court determined that contrary to the defendants' arguments, violations of *Ring II*'s jury trial right could be held harmless. *Ring III*, 65 P.3d at 933-936. The court held that

a sentence could be affirmed on the theory that the error was harmless, if and only if the court could conclude, that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt" and "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. This standard is substantially the same as Arizona's pre-*Ring II* law regarding other forms of constitutional error in capital sentencing decisions by judges. *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)(refusing to affirm death sentence "[w]here there is a doubt whether the death sentence should be imposed"). However, it had another basis as well: the Arizona Supreme Court's determination that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *Ring III*, 65 P.3d at 943; *see also State v. Bible*, 858 P.2d 1152, 1212 (1993)(expressing strong preference for remand where there is error in a capital sentence because fairness and accuracy are promoted by single factfinder who can consider all evidence).

2. Respondent's Case.

A. Mr. Phillips' Childhood.

Keith Royal Phillips was born on August 14, 1977 and was 20 years old at the time of his arrest. He suffered an exceedingly chaotic, abusive childhood. His mother decided initially to give him up for adoption, then changed her mind, and then gave him to her brother Royal and his wife Terry when Mr. Phillips was 18 months old. (RT 6/14/99 at 15-20.) These caretakers inflicted continuing, and serious, physical and emotional abuse over the next 14 years. Mr. Phillips had marks on his body "most of the time [he] could remember." (RT 6/14/99 at 15.) The abuse worsened as he grew older. In addition to suffering physical abuse, Mr. Phillips also suffered sexual abuse from a "family friend" when he was 8 years old.

When he was 14, his "father" pushed his head into a wall because he was talking to his girlfriend on the phone. (Pen. Phase Evid. Exs. 17 at 11, 26 at 16-18; Agg./Mit. Ex. J at 3). The girlfriend reported the abuse to County authorities, who commenced a several month investigation that resulted in Mr. Phillips being placed in foster case after he had also run away because he was being "punched and hit and kicked."[4] (Agg./Mit. Ex. A "Penalty Phase Evidence" Exs. 22, 26 at 14; Agg./Mit. Exs. D at 11-14, D-1, E at 11, E-L1, G at 11-14, G-1, J at 3; ROA 356, Exs. 38 at 5, 53 at 1-4, 58 at 5-7.) The court found Mr. Phillips "at risk of injury to person or health, mental or physical," ordering him to remain under the care and custody of the State. (Pen. Phase Evid. Ex. 14). The court ordered counseling and evaluations for the family members. Id.

Mr. Phillips was subsequently allowed to return to the "home" on conditions of further family counseling, monitoring, and preventive services. The very next month, Mr. Phillips was admitted to the hospital in Syracuse, New York because he was extremely depressed and suicidal. (Pen. Phase Evid. Ex. 21.) He told his attending physician, that his parents had just informed him they were giving him back to his "Aunt Wendy", Wendy Sexton, who

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[4] The allegations included, inter alia, (1) that Royal punched and kicked Mr. Phillips, knocking him to the ground and causing an injury to his face by his eye. His mother stood by. Then Royal made him get out of bed to do 50 pushups; (2) that Royal slapped him in the face with a loaded paintbrush, getting paint in his eyes, whereupon Royal tossed him a paint thinner-soaked rag and told him to wash his eyes out with it; this burned; (3) that Royal punched him and threw him in a truck, then made him strip so he could beat him with the buckle-end of a belt, causing bruises to his back, neck, legs, and face; (4) that Royal hit him with a piece of wood in his lower abdomen, causing a lump, and that hewas then unable to stand or urinate or attend school; Royal told him to lie about this and call it a "canoeing accident"; (5) that Royal threw a football at his face, which he attempted to block with his hand, resulting in his finger being snapped; his finger remains crooked. (Pen. Phase Evid. Exs. 17, 22, 25, 26.) These incidents were corroborated by outside witnesses, and some were admitted by Royal. (Id.) Mr. Phillips had numerous hospital admissions as well, including (1) 1981 lacerated tongue; (2) 1988 scalp laceration; (3) 1991 possible concussion from a blow to the back of head; (4) a "skiing" accident that occurred at 8:30 p.m. one night in 1991, which caused a broken collarbone. (ROA 356 Ex. 38.)

was actually his biological mother, and a drug and alcohol addict living in San Francisco. The Phillips no longer wanted him, as he had "blown the whistle" on their abuse, and he returned to San Francisco with his mother. (ROA 356 Ex. 36 at 3.) Mr. Phillips' mother did not parent him; she neglected him, except she did smoke a lot of marijuana with him. "She simply didn't care what [he] did." (Agg./Mit. Ex. J at 4; ROA 356 Ex. 36 at 3).

Mr. Phillips attended an inner-city school in San Francisco. (ROA 356 Exs. 36 at 3, 45, 46, 58.) In February of 1993, when Mr. Phillips was 15, he ran away from home, and was arrested for participating with two other minors in a theft. (Id,. Ex. 58 at 3-4.) He told a psychologist after his arrest that he was using alcohol, marijuana, and LSD on a daily basis. (ROA 356 Ex. 58 at 4-8.) Mr. Phillips was diagnosed as having an identity disorder of adolescence. As a result of the offense, Mr. Phillips was sent to the Arizona Boys Ranch in Oracle, Arizona. (ROA 356 Exs. 36 at 4, 45 at 4, 49.) He adapted well to the Ranch for most of the time he was there, but eventually became suicidal and slashed his wrists while there. (Id. at 5.)

After leaving the Ranch in 1995, Mr. Phillips began to drink. (Agg./Mit. Ex. J at 5.) He married in 1996 and became a stepfather to his wife's two daughters. (PSR CR-61684 at 3; ROA 356 Ex. 59.) Soon after his marriage, Mr. Phillips enlisted in the Navy. (ROA Exs. 45 at 4, 51; Agg./Mit. Ex. J at 4-5; PSR CR-61684 at 3.) Because he had insufficient contact with his family in the Navy, he became depressed and suicidal and slashed his wrists again. (Id.) The Navy agreed to a general discharge in October, 1997. (Id.) Mr. Phillips returned home to his family in Tucson, but became extremely depressed because he thought he had failed to take advantage of the opportunities the Navy had offered. (Id.)

It was at this time that he met Marcus Finch, a crack addict who is 7 years older than Mr. Phillips, and continued his lifelong pattern of substance abuse that had begun in childhood.(Agg./Mit. Ex. J at 5; PSR CR-61684 at 3; ROA 403 at 1.) Mr. Phillips not only

began to abuse alcohol, but also took marijuana, LSD, cocaine and Valium. (Id.) When his substance abuse went out of control, he was fired from his job. (Id.) He then began to use crack provided to him by Mr. Finch just before the instant offenses began. (Id.) He was using crack and other substances such as Valium and cocaine during all of the offenses in this case, described below.

B. The Crimes.

1. Famous Sam's Valencia Road.

Mr. Phillips and Mr. Finch were charged with Counts 28 through 56 of the Indictment for offenses committed during an armed robbery at the Famous Sam's bar and restaurant on Valencia Road in Tucson on April 28, 1998. (ROA at 1.) The conviction of Count 28 was for the first degree murder of one of the patrons. Margaret Damron testified at the dual jury trial that she was working the bar on the night of April 27, 1998. (RT 2/11/99 at 69-72.) After midnight, some customers were playing pool, and some were sitting at the bar on the other side of the building. (Id. at 71-74.) At approximately 12:30 a.m., Mr. Finch came in the front door on the southeast part of the building. (Id. at 75-78.) He asked how much a Killian's Red beer was. (Id. at 78-79.) He said he was going to his car to get some money. (Id.) He left, then came back after about a minute and sat at the bar and ordered a beer. (Id. at 79-80.) After checking his ID, Ms. Damron served him. (Id. at 79-80.) Ms. Damron then went to the other end of the bar to speak to another patron, Sandra Sellards. (Id.) When she looked back, however, Mr. Finch was no longer there. (Id. at 80.) She then saw Mr. Phillips walk through the front door carrying what appeared to be a sawed-off rifle or shotgun. (Id. at 81.) He turned right toward the video games, and fired six shots, injuring two patrons who were sitting at the bar. (Id. at 50-67; RT 2/16/99 at 77-85.)

Ms. Damron and Ms. Sellards ran into the cash office and locked the door. (Id. at 81-82.) Ms. Damron saw Mr. Finch running in the direction of the pool tables holding a

black handgun. (Id. at 83-84.) Ms. Sellards dialed 911 from the office phone and then hid under the back counter top. (Id. at 84.) Mr. Phillips broke into the office and saw the phone. (Id. at 85-86.) He smashed the phone with the butt of his gun, then pointed his gun at Ms. Damron's head and told her to "give me the money". (Id.) Ms. Damron said that the key for the drawer was out at the bar. (Id. at 86.) He let her get the key. (Id.) She came back and opened the drawer while he told her to "Hurry up" and "Give me the money, bitch". (Id. at 86.) When she got the drawer open, he held out his shirt and told her to put the money in it; Ms. Damron complied, and he left. (Id. at 86-87.)

Kory Siquieros testified that he was in the pool table area on the other side of the building when he heard what sounded like "firecrackers" going off. (Id. at 116-118.) He could hear, but not see, someone yelling "Get down on the floor." (Id. at 118.) As he got down, he saw his friends Kevin Hendricks and Preston Juan running out the back door. (Id. at 118-119, 127.) He then saw Mr. Finch run out the back door after them with a gun. (Id. at 119.) Mr. Finch shot and killed Mr. Hendricks as he was trying to escape.

2. Famous Sam's Silverbell Road.

At the same trial, Mr. Phillips and Mr. Finch were also charged with Counts One through Eleven of the Indictment, which were offenses committed at the Famous Sam's on Silverbell Road in Tucson on April 12, 1998. (ROA 1.)

Beverly Rochon was tending bar on April 12, 1998 at the Famous Sam's on Silverbell Road in Tucson. (RT 2/9/99 at 88-90.) While she was closing, sometime after 1:00 a.m., Mr. Finch and Mr. Phillips entered the bar with guns through the back door. (Id. at 94-95.) Mr. Finch charged directly at her and told her to get into the cooler. (Id.) He led Ms. Rochon into the walk-in cooler and pushed her in. (Id. at 95-97.) The men stood in the doorway of the cooler waving their guns demanding money. (Id. at 105). Then Mr. Finch began waving his gun and "screaming profanities." (Id. at 107-108.) Ms. Rochon led Mr.

Phillips to the cash room, and he kicked the door down because she did not have the key. (Id. at 107-109.) He held the gun to her head, telling her to give him the money or he would kill her. (Id. at 109-110.) He took the cash box and cash from the drawer. (Id. at 109-110.) Waitress Shelly Raab testified that Mr. Finch ran up to her with a shotgun; her reaction was to drop to her knees. (Id. at 67-73.) Mr. Finch pointed the gun at her chest and told her to "get in the cooler, bitch". (Id. at 73-74.) Before she could move, however, he shot her in the chest. (Id. at 75.) She suffered serious injuries but did not die. (Id.)

3. The Firelite Lounge.

Mr. Phillips and Mr. Finch were also charged with Counts Twelve through Twenty-Seven, which were for offenses at the Firelite Lounge. (ROA 1.) Count Twelve was for the attempted first degree murder of a patron. (Id.) Vince Hurtado testified that he was with friends at the Firelite Lounge in the early morning of April 12, 1998. (RT 2/10/99 at 186-188.) Mr. Finch came into the bar and asked for a beer. (Id at 190.) Mr. Phillips came in also and stood behind Mr. Hurtado. (Id. at 190-191.) Mr. Phillips then yelled "hit the floor, I'm not kidding, this is a hold-up". (Id.) Mr. Hurtado saw Mr. Finch was now pointing a handgun at the bartender. (Id. at 192.) Mr. Hurtado laid down next to his friend Bill Gilson. (Id.) Mr. Phillips then poked Mr. Hurtado in the back of his head with his gun and told him to give him his money, which he did. (Id. at 192-196.) He also saw Mr. Gilson throw something. (Id.) Mr. Phillips then told them all to get up and go into the bathroom. (Id. at 197-198.) As they all filed in, Mr. Hurtado heard two "pops" and felt Mr. Gilson fall against him. (Id. at 199-200.) Mr. Gilson said that he had been hit. (Id. at 200.) Mr. Hurtado looked out, saw the men were gone, and called 911. (Id. at 201-202.) He identified Mr. Finch and Mr. Phillips in photo lineups in court. (Id. at 203-206; RT 2/11/99 at 11-16.) Mr. Gilson was seriously injured but did not die. (Id.)

C. The Death Sentence.

Based on the above evidence, Mr. Phillips' jury convicted him of all counts, except Counts 21, 30, 35-36, 44-46, 50 and 54. (ROA 203-249, 366.)

Based upon the facts set forth previously, Mr. Phillips proffered numerous statutory and nonstatutory mitigating factors. (ROA 355 at 1-10.) One of the factors proffered was the statutory mitigating circumstance under §13-703(G)(1) that his capacity to conform his conduct to the requirements of the law was significantly impaired. (ROA 355 at 4-5.)[5] As evidence of this factor, Mr. Phillips presented, *inter alia*, the testimony of Dr. Larry Morris, a clinical physhologist specializing in the subject of male survivors of abuse during childhood. (RT 6/14/99 at 7-9.)

Based on relevant factual information concerning Mr. Phillips and the offenses, Dr. Morris testified that Mr. Phillips exhibits, and has a history of, psychological symptoms characteristic of male survivors of child abuse, such as hypervigilance, substance abuse, depression, post-traumatic stress, dissociation, suicidal threats, built-up anger, self-mutilation, distrust, and nightmares of abusive experiences. (RT 6/14/99 at 20-45; Agg./Mit. Ex. J. at 5-8.) These symptoms, which are the result of Mr. Phillips' being abused, rejected, abandoned and neglected by "everyone significant in his life", show that Mr. Phillips is "very dysfunctional". (RT 6/14/99 at 41-42; Agg./Mit. Ex. J at 6.) Mr. Phillips also has several psychological disorders attributable to and characteristic of male survivors of an abusive childhood: (i) a borderline personality disorder, (ii) a mood disorder characterized by depression dysphoria, (iii) polysubstance abuse and (iv) post-traumatic stress symptomology. (RT 6/14/99 at 41-44; Agg./Mit. Ex. J at 6.) In addition, Dr. Morris

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[5] The additional factors proffered were (i) intoxication at the time of the offense, (ii) significantly impaired capacity (nonstatutory), (iii) age, (iv) history of substance abuse, (v) abusive and dysfunctional childhood, (vi) relatively minor participation in the murder under §13-703(G)(3) and as nonstaturoy factor, (vii) familial responsibilities, (viii) family support, (ix) remorse, (ix) liability for first degree murder based on killing by Mr. Finch, and (x) lack of intent to kill. (Id.)

opined that Mr. Phillips' offenses were "causally connected" with and "strongly related" to the above disorders. Moreover, Mr. Phillips was both sexually and physically abused, compounding his psychological problems; sexually abused male children develop additional problems with anger and substance abuse; physical abuse within the home combined with sexual abuse outside the home is a particularly frightening situation so special survivor mechanisms are developed because the child is left literally with no safe place. Anger and drug abuse help children develop a "safe place". (Id. at 20-24.) Mr. Phillips' mental disorders would also cause him to act impulsively. (Id. Based on the above, Dr. Morris concluded that Mr. Phillips' mental disorders resulting from his childhood abuse, neglect and rejection alone would have affected his capacity to control his actions at the time of the offenses, and that his use of drugs such as crack at the time of the offenses would clearly have impaired that capacity. (Id.) Based on Dr. Morris' expert testimony and the factual record in this case, Mr. Phillips argued that he had established by a preponderance of the evidence the mitigating factor in §13-703(G)(1).

The State two proffered aggravating factors. One was that Mr. Phillips had been previously convicted of "serious offenses" under §13-703(F)(2). This factor was based upon (i) the "serious offenses" he was convicted of at trial, which included aggravated assault and armed robbery and (ii) Mr. Phillips' conviction of three serious offenses in Pima County Case No. CR-61684, an armed robbery of the Silverroom bar, which the State alleged Mr. Phillips committed by himself on April 26, 1998. The other aggravating factor proffered by the State was that Mr. Phillips committed the offenses for "pecuniary gain" under §13-703(F)(5).

Based upon the aggravation and mitigation submitted, the trial court issued a Special Verdict imposing a sentence of death on Mr. Phillips for his first degree murder conviction. The court found that the death eligibility standard of Enmund v. Florida, 458 U.S. 782

(1982) and Tison v. Arizona, 481 U.S. 137 (1987), was met. (Id. at 1-2.) (ROA 370.) The court also found that the State had proven the aggravating factors of §13-703(F)(2) and (5) beyond a reasonable doubt. (Id. at 2-3.) The court also rejected virtually all of the proffered mitigating evidence as not being "mitigating". (Id. at 4-6.)[6] The court therefore held that the mitigating evidence offered did not outweigh the aggravating factors, and imposed death. (Id. at 1-6.) All of this was accomplished by the trial court acting alone, and not by a jury.

D. The Appeal.

In *State v. Phillips*, 46 P.3d 1048 (Ariz. 2003) (hereinafter "*Phillips I*".) the Arizona Supreme Court vacated Mr. Phillips' conviction of premeditated first degree murder based on insufficient evidence. The court affirmed Mr. Phillips' conviction of felony murder, however, and also affirmed his death sentence. *Phillips I* at 1059-1062, ¶¶49-82. The court held, however, that the trial court erred in relying on Mr. Phillips' convictions from the Famous Sam's Valencia Road offenses on April 28, 1998 to support the prior serious offense aggravating factor under §13-703(F)(2). *Id.* at 1059-1060, ¶¶56-57. The court held that the factor was properly found, however, based on the convictions from the Famous Sam's Silverbell Road and Firelite Lounge offenses, and from Mr. Phillips' three convictions in Pima County Case No. CR-61684 in September of 1998. *Id.*

Following this Court's decision in *Ring II*, and based upon the harmless error test set forth in *Ring III*, the Arizona Supreme Court reviewed Mr. Phillips case to determine whether the *Ring II* error in his case was harmless error. *Phillips II*, *supra*. The court affirmed the finding of the (F)(2) prior serious conviction aggravating factor based upon its decision in *Ring III* that this factor is exempt from the jury trial requirement of *Ring II*. See

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[6] The only mitigating factor the court found to be proven was family support, and the court found this factor to have "no weight". (Id. at 5.)

Phillips II, at 67 P.3d at 1230, ¶¶4-5, *Ring III*, *supra*, 65 P.3d at 936 ¶¶54-68.

The court stated that the (F)(2) factor was supported by the 25 convictions from the Famous Sam's Silverbell and Firelite Lounge incidents, and his convictions in CR-61684 in September of 1998. Id. However, the court held that the error in the finding of the pecuniary gain factor of §13-703(F)(5) was not harmless error, based upon the fact that it was Mr. Finch, and not Mr. Phillips, who shot the victim, and that there was "little evidence as to Phillips' intent and motivation regarding Finch's killing of Hendricks", and the court therefore could not say that "a jury would be unreasonable to conclude that Phillips' participation in the murder was motivated by something other than pecuniary gain". Id. at 1230-1231, ¶¶10-11. The court further held, based upon its harmless error analysis in *Ring III*, which includes a review of the mitigating evidence in the case, that it could not say that "a reasonable jury would not have found additional mitigating factors or weighed differently the mitigating factors that were found." Id. at 1231, ¶14.[7] The court therefore remanded Mr. Phillips' case for the jury sentencing required by *Ring II*, and amended §§13-703 and 13-703.01, which required a jury determination on aggravating and mitigating circumstances, and the weighing of those factors to determine if death should be imposed. Id. at ¶15.

Respondent now requests this Court to deny the Petition.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT'S DECISION BELOW RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT SAID WAS PERMISSIBLE IN *CLEMONS V. MISSISSIPPI*.

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[7] The court noted that Mr. Phillips had offered "more than 10 mitigating circumstances for the court's consideration" and that the trial court had only found two such factors to be present. Id. at ¶14. As stated above, Mr. Phillips reading of the trial court's Special Verdict is that only one mitigating circumstance, family support, was found by the trial court, and that was given no weight.

For the reasons stated below, the harmless error analysis adopted by the Arizona Supreme Court in *Ring II* is to determine whether *Ring II* error is harmless is completely consistent with *Clemons v. Mississippi*.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor which is either exempt from *Ring II*, implicit in a jury's verdict, or supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that "the procedures urged by the State [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, 65 P.3d at 943. The court went on to describe the consistency of Arizona's statutory capital sentencing scheme that has always "assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. [It refused to] speculate about how the State's proposal would impact this essential process." *Id.*

The court later discussed the need to have mitigating circumstances included in its review of error under *Ring II* for harmless error: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Id.* at 946. Citing Arizona's statutes, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* This result is permissible under this Court's jurisprudence and dictated by the nature of Arizona's capital sentencing scheme.

Arizona is a weighing state. *See State v. Richmond*, 886 P.2d 1329 (1994). In *Clemons*, this Court held that when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)(decision to reweigh or remand "is for state appellate courts. . .to make.")(footnote omitted). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring pure jury sentencing, it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*, and the Arizona Supreme Court's determination in *Ring III* of the form that that harmless error review should take, and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this Court in *Clemons*.

This Court does not sit to review such decisions of state law, state criminal procedure and state sentencing policy. *See* Sup.Ct. R. 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("if resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do."). This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It now should "give state judges a clear[ ] opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 7 (1995), quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Arizona's decision to include mitigating circumstances in its harmless error review in *Ring III* does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II*. *Ring II*, 536 U.S. at 609, n.7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue in *Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002), was controlled by Nevada law.[8] Similarly, in *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court held that Colorado's "three-judge panel capital sentencing statute. . .is unconstitutional on its face under *Ring*" but that defendants sentenced under that statute were entitled to resentencings "under Colorado law[.]" 64 P.3d 256, 262 (Colo. 2003). The court cited to Colorado law interpreting the Colorado death penalty statute in determining which jury findings were eligibility findings. *Id*, at 264 (quoting *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). Thus, the legal landscape developing after *Ring II* may not be homogeneous, but it is not in conflict. Each state has applied this Court's decision to their state capital punishment laws and, as long as those decisions do not violate the requirements of *Ring II* and *Clemons*, that is all this Court requires.

The state complains that twenty-six capital cases will be affected by this decision. However, of the 31 cases on direct appeal when *Ring II* was announced, at least seven have been resolved on grounds other than *Ring II*, and in an additional three cases similar to Mr. Phillips', the time for petitioning for certiorari has already run without a petition from the state. At this rate, only this and a handful of other cases would be affected were this

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[8]The court held: "Nevada statutory law requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." *Johnson v. State*, 59 P.3d at 460 (italics in original)(footnote omitted).

Court to accept, wholesale, Arizona's arguments in this petition. Even then, given historical error rates in Arizona, the sentences in most of those cases would be eventually reversed in later proceedings. *See* James S. Liebman, et. al., *A Broken System, Part II: Why there is so much error in capital cases, and what can be done about it* (visited Sept. 26, 2002), http://www.law.columbia.edu/brokensystem2>. Rather than delay capital proceedings in Arizona for yet another year, fairness and judicial economy favor allowing the jury resentencings that the Arizona courts have ordered, under the new statutory procedures the Arizona legislature has prescribed, to begin.

Finally, Petitioner's contention that Mr. Phillips' death sentence should be affirmed because his aggravating factor under §13-703(F)(2) was upheld by the Arizona Supreme Court should be rejected in this case for several reasons. First, the weight of that factor has been substantially lessened since the time that factor was originally found by the trial court. As stated above, the Arizona Supreme Court held that the trial court erred in using his convictions of serious offenses relating to the Famous Sam's Valencia Road incident as prior serious offenses to support the (F)(2) aggravating factor. This means that the number of convictions from Mr. Phillips jury trial in case which were used to support the (F)(2) factor have been reduced by approximately 28 convictions, leaving approximately 25 convictions from the jury trial to support (F)(2). See *Phillips II*, supra, 67 P.3d at 1230, ¶¶4-5. In addition, Mr. Phillips' convictions in Pima County Superior Court Case No.61684 have been vacated as a result of the granting of Mr. Phillips' Petition For Post-Conviction Relief in that case on the ground of ineffective assistance of counsel. (See Appendix C.) This Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988), therefore precludes the use of those convictions to support the (F)(2) aggravating factor and use of those three vacated convictions as aggravation would violate the Eighth Amendment. This further reduces the number of convictions supporting (F)(2) factor from 25 to 22 convictions. Due

to the significant reduction of convictions which can be used to support (F)(2), the weight of that aggravating factor has been substantially reduced. Since Arizona is a weighing state, and since weighing of the now vacated convictions would violate the Eighth Amendment, the (F)(2) factor cannot simply be affirmed, and must be reweighed. *See Clemons, supra*; *Stringer v. Black* 503 U.S. 22 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992).

In addition, and as stated above, Mr. Phillips' conviction of premeditated murder was vacated by the Arizona Supreme Court in *Phillips I*, and that further changes the balancing of the aggravation and mitigation by increasing the mitigation side of the balance with mitigating factors. See e.g. *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70, 82-83 (1983)(mitigating that defendant did not kill victim and had no intent to do so). Thus, this is another change to the balancing of aggravating and mitigating circumstances which requires that Mr. Phillips' aggravation and mitigation be reweighed, and prohibits simple affirmance of his death sentence, which is what the State seeks at this time.

Finally, the result requested by Petitioner, which is simply to affirm Mr. Phillips' death sentence because the (F)(2) factor has been found to be valid on appeal, is an unconstitutional remedy in a weighing State such as Arizona, and is appropriate only in a non-weighing state. *See Stringer, supra*, at 229-231.

II. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the grounds urged by Petitioner. There are a number of such reasons which should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)(decision may be affirmed on grounds other than those stated by lower court).[9]

A. Denial of the Jury Trial Right Guaranteed by Ring is Structural Error That Should Not be Subject to Harmless Error Review.

This Court has held that unlike "an error in the trial process itself . . . structural defects in the constitution of the trial mechanism" can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been "altogether denied," because in such a case "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial process, but rather in the statutory structure governing capital sentencing – a classic "structural defect in the constitution of the trial mechanism" – that "altogether denied" capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the "wrong entity" – the judge – the job of determining the defendant's guilt as to those determinations. As the two *Ring III* dissenters recognized, harmless error review in cases like this "puts the [appellate

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[9]Because Respondent is not seeking to change the judgment below, which properly ordered a full sentencing retrial, he has not filed a formal cross petition raising these issues, but would seek to have these issues considered in the event certiorari were granted. *See* ROBERT L. STERN, ET. AL, SUPREME COURT PRACTICE, at 363-364 (7th ed. 1993).

court] in the position of speculating about one of the great unknowables-what a non-existent jury would have done." *Ring III*, 65 P.3d at 948 (Feldman, J., concurring in part and dissenting in part). Harmless error analysis cannot apply in such a case. See also Summerlin v. Stewart, 2003 WL 22038399 (filed September 2, 2003) at *31-34 (*Ring* error structural error).

B. The Jury Trial Right Recognized in Ring Properly Applies to Aggravating Factors Involving Convictions for Other Criminal Conduct: Almenderez-Torres Should be Overruled.

As Justice Thomas' concurrence in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) shows, this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), suffered from the same constitutional error as *Walton v. Arizona*, 497 U.S. 639 (1990). Petitioner argues that the prior conviction aggravating circumstance found by the trial judge should have determined the outcome here because it exempts the case from the decision in *Ring II*. Thus, if certiorari were granted here, the case will necessarily present the threshold question of whether, in light of the history reviewed there and in *Ring II*, this Court should overrule *Almendarez-Torres*.

The Arizona Supreme Court relied on *Almendarez-Torres* in finding the trial judge's determination of the prior conviction aggravating factor harmless. This is problematic for several reasons. First, it misapprehends the holding in *Almendarez-Torres*. As *Apprendi* noted, the defendant in *Almendarez-Torres* pleaded guilty, and in so doing, both waived his right to jury trial and admitted the previous felony convictions. Thus, the case before this Court only dealt with the sufficiency of the underlying indictment under the Fifth Amendment, and presented "no question concerning the right to a jury trial." *Apprendi*, 530 U.S. at 488. That question was presented in *Ring II*, where this Court held that "[c]apital defendants . . . are entitled to a jury determination of *any* fact on which the legislature conditions an increase in their maximum punishment." *Ring II*, 122 S. Ct. at 2432

(emphasis added). The fact of prior conviction squarely meets that description. *See also Apprendi*, 530 U.S. at 487, 489-90 (holding that even assuming arguendo that *Almendarez-Torres* was correctly decided, it is "at best an exceptional departure" from the rule announced in *Jones* and *Apprendi*).

Moreover, Justice Thomas, voting with a five-member majority in *Almendarez-Torres*, repudiated his vote less than a year later, making clear that he now regards *Almendarez-Torres* as wrongly decided. *See Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). Thus, it is plain that a five-Justice majority of this Court no longer adheres to that decision.

Third, even if *Almendarez-Torres* remains applicable in the application of *Ring II* in some states, its logic does not apply in Arizona. The statute at issue in *Almendarez-Torres* was a recidivist statute. This distinction compelled the result in that case because recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." 523 U.S. at 243 (citations omitted), and thus was not an element of the offense in question. *Id*, at 243-244. Arizona, conversely, elected in the capital context to make prior convictions not a penalty for recidivism, but an element of the crime of capital murder as much as any other aggravating factor listed in A.R.S. § 13-703(F). As that court has explained on numerous occasions:

> **Our death penalty statute is not a recidivist or enhancement statute used to warn convicted criminals or encourage reform. . .. The purpose of the aggravation/mitigation hearing is to determine the character and propensities of the defendant. . .. That a defendant has been found guilty of another offense for which life is imposable is directly relevant to this determination. . ..**

State v. Walden, 905 P.2d 974, 994-995 (1995)(citations omitted). Therefore, Arizona's death sentencing statute explicitly treats prior convictions as elements of the crime of capital murder, not as recidivist penalty enhancements, and thus does not fall within the

D. **The Logic of Ring II, and Developments Since Ring II, Make it Apparent That Judge Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and Spaziano and Cabana Should be Overruled.**

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates juries must make the ultimate sentencing decision. If this Court grants Arizona's request for certiorari review, this Court should also consider that evolving standards of decency require that *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. MONT. CODE ANN. § 46-18-301; NEB. REV. STAT. § 29-2521. All but three of the 36 states make juries' determinations of sentence controlling.[10] This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)(discussing 18 states which prohibit execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, supra at 789 noting that only eight states permitted death sentences in cases where defendant participated in underlying felony but did not attempt or intend to kill. Given the nearly unanimous enactment of jury sentencing by state

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[10]Only in Florida, Alabama, and Delaware do judges retain sentencing authority after the jury's decision is reached. FLA. STAT. CH. § 921.141; ALA. CODE § 13A-5-47 (1975); DEL. CODE ANN. Tit. 11, § 4209. In Florida, the jury's sentence determination must be considered and given great weight. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Alabama requires the sentencing judge to consider the jury's recommendation of sentence before making its decision. ALA. CODE § 13A-5-47 (1975).

legislatures. Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by this case, if certiorari is granted here.

E. **The Arizona Courts Violated *Lockett v. Ohio* and *Eddings v. Oklahoma* By Disregarding Mitigating Evidence Where It Is Not Shown To Cause The Defendant's Conduct At The Time Of The Crime.**

1. **Evidence of a Traumatic Family and Developmental History Is Relevant Mitigating Evidence.**

This Court has repeatedly stressed the important and unquestionably mitigating nature of evidence that a capital defendant suffered from childhood abuse, even when the evidence is completely unrelated to the crime for which the defendant is sentenced. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]."); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"). This Court finds evidence of childhood abuse relevant and undeniably mitigating. And this Court does not restrict the consideration of mitigating factors to only those shown to have caused defendants' actions at the time of the crime. See *Williams (Terry) v. Taylor*, 120 S.C. 1495, 1512-1514 (2000)(reversing for defense counsel's failure to investigate and present evidence that documented childhood abuse). Evidence of childhood abuse must be considered as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114.

Obviously, extensive childhood abuse and neglect damages one's emotional health. "It defies reason and common experience to suggest that a youngster coming out of [a horrific environment] was largely unaffected and should be held accountable as any functioning adult." *State v. Hoskins*, 199 Ariz. 127, 14 P.3d at 997, 1031 (Zlaket, C.J., dissenting). As Chief Justice Rehnquist recognized, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745 (1982). Although medical science is not yet fully capable of quantifying and tracing the causal relationship between such abuse and criminal behavior, medical literature does reveal how childhood physical abuse may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications For The Death Penalty*, 77 N.C.L.REV 1143, 1185 (1999). Medical literature shows that sexual abuse is extraordinarily destructive to a child's psyche, especially for young males, in whom sexual abuse causes the most emotional and psychological distress, intense fear, anxiety, and stress. See e.g. *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 884-886 (1997).

A sentencer must not be precluded from considering a capital defendant's proffered mitigating evidence of "any aspect of defendant's character, or record, and any of the circumstances of the offense" in all but the rarest of cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Evolving standards of decency and "the fundamental respect for humanity underlying the Eighth Amendment" require individualized sentencing "as a constitutionally indispensable part of inflicting the death penalty." *Eddings v. Oklahoma*, 455 U.S. at 114, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Evidence of childhood

abuse is relevant in sentencing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable" than others. *Penry*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 497 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The sentencing body must have a vehicle for assessing the mitigating nature of the evidence that reflected on the defendant's personal culpability to determine what sentence is warranted. *Penry*, 492 U.S. at 322. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. Although courts "may determine the weight to be given relevant mitigating evidence[,]" they "may not give it no weight by excluding such evidence from their consideration." *Id.*, 455 U.S. at 115. Restricting consideration of mitigation creates a risk of an inappropriately severe sentence. *Lockett*, 438 U.S. at 605. Since "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Id.* at 604, states must be able to consider the mitigating evidence of childhood abuse without having to first find a causal connection between the abuse and the crime. Since it is mitigation, the sentencer should include it in the weighing process.

2. The Arizona Courts Flatly Refuse to Recognize This Court's Prior Holdings That a Traumatic Upbringing Is Mitigating Evidence.

Mr. Phillips' abusive and dysfunctional childhood and resulting emotional troubles were clearly established in a court of law by a preponderance of the evidence. The Arizona Supreme Court refused to consider this evidence as mitigation because there was no causal connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Phillips* I, 46 P.3d at 1060 at 59-61.

Courts in other jurisdictions have faithfully followed this Court's precedent and

determine that evidence of a traumatic upbringing is mitigating.[11] Arizona, however, regularly dismisses uncontroverted evidence of childhood abuse as irrelevant in the absence of proof that it somehow caused the crime. The Arizona Supreme Court has historically restricted its consideration of mitigation where a defendant proves that he suffered an abusive childhood. The Court repeatedly refuses to consider evidence of a dysfunctional family as mitigation without a causal connection to the defendant's ability to perceive, comprehend, or control his actions. See *State v. Sansing*, 26 P.3d 1118, 1131 (2001); *State v. Hoskins*, *supra* at 1023; *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999); *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); *State v. McKinney*, 185 Ariz. 567, 587, 917 P.2d 1214, 1233 (1996); *State v. Laird*, 186 Ariz. 203, 920 P.2d 769 (1996); *State v. Murray (Robert)*, 184 Ariz. 9, 906 P.2d. 542 (1995); *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied*, 516 U.S. 878 (1995). Sentencing judges are prevented, as a matter of Arizona law, from considering proven evidence of a difficult upbringing unless a causal connection is established.

> **A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction ... can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts.**

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[11] *See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State*, 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight); *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

Hoskins, 14 P.3d at 1021. "The factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.* (emphasis added).

The Arizona statute challenged herein, A.R.S. § 13-703, was found over 10 years ago in *Walton v. Arizona* to be constitutional because Mr. Walton was "not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence," but instead was challenging the burden of proof by which mitigation should be considered. 497 U.S. 639, 649 (1990). This Court expressly stated that it "has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Id.* "A state may not preclude by statute, nor may a sentencer refuse to consider, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

Since *Walton*, however, the Arizona Supreme Court has repeatedly excluded an entire category of mitigating evidence offered by capital defendants: mitigating factors that could not be or were not proven to have caused the crime. Arizona courts are not *able* to consider a difficult childhood as mitigation, statutory or non-statutory, unless the causal connection is established; thus, entire types of mitigation are precluded in violation of the rule set forth in *Walton*.

This Court found such practice impermissible, where "the sentencing judge did not evaluate the evidence and find it wanting as a matter of fact; rather he found that as a matter of law he was unable to even consider the evidence." *Eddings*, 455 U.S. at 113. A categorical denial of credible evidence of a traumatic childhood because it did not cause the crime is tantamount to denying that evidence as a matter of law. There is a valid distinction between merely disbelieving evidence which a defendant offers and precluding consideration of that mitigating evidence altogether when it is proven. The latter approach,

which Arizona takes, is unconstitutional.

After all mitigating evidence is allowed in for consideration, then federal law allows states to structure their consideration of mitigating factors. For example, if a state decided to give more weight to the mitigating factor of age than to the mitigating factor of good behavior in prison, it could do so. Here, there was no "vehicle," under Arizona law, for the sentencing court to "express[] its 'reasoned moral response'" to the mitigating evidence. See *Penry I*, 492 U.S. at 328, and *Eddings*, 455 U.S. 104. A sentencing scheme that precludes individualized sentencing "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind." 492 U.S. at 304. Thus, the causal connection requirement, which excludes relevant evidence and deems it irrelevant, is a direct violation of the Eighth Amendment protections carved out in *Lockett*, *Eddings*, and their progeny.

3. **Even If a Causal Connection Were Constitutionally Permissible, Such Connection Was Demonstrated In This Case**.

Although a qualified medical professional, Dr. Larry Morris, testified that Mr. Phillips' abusive and dysfunctional childhood affected his capacity to control or conform his actions on the night of the crime, the Arizona Supreme Court refused to find a causal connection. As shown from Mr. Phillips' case, Arizona's requirement that such a relationship be proved thus effectively prevents the sentencer from considering such evidence at all in most cases. If certiorari is granted here, Arizona's gross and systemic disregard of the teachings of *Lockett* and *Eddings* should be corrected.

F. **Respondent Was Denied His Right to Counsel When the Arizona Supreme Court Consolidated His Case with 30 Others and Appointed One Lawyer to Brief and Argue for All Defendants**.

Following this Court's remand of Respondent's case to the Arizona Supreme Court for consideration in light of *Ring II*, the Arizona Supreme Court consolidated Respondent's

case with those of thirty other capital defendants then pending direct appeal. The Court further ordered that one "lead counsel" would be responsible for all briefing and argument before that Court. Although Respondent objected repeatedly to this process, he was forced to accept representation by one lawyer, counsel for Timothy Ring. As a result, Respondent was not able to present all of the arguments entitling him to relief. By compelling him to accept conflicted counsel and forcing him to rely on the truncated and over-generalized arguments that resulted, Respondent was deprived of effective representation under the Sixth Amendment.

Arizona requires that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Ariz. R. Sup.Ct. 81, Canon 3.B(7). The ethical requirement that a court must allow a defendant the right to be heard was more compelling here, for the requirement fulfills the constitutional mandate for the enactment of capital sentencing statutes by the states. To pass constitutional muster, a capital sentencing scheme must allow for an individualized determination of death-worthiness that includes a full consideration of any mitigating circumstances, and that weighs the appropriateness of the death sentence for the person and the crime.

> **For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."**

Penry v. Johnson, 532 U.S. 782, 797 (2001)(internal citations omitted).

By adopting the consolidation strategy, the vast majority of the thirty-one defendants were not heard. Not only were the procedural postures of the defendant's cases varied,[12]

[12] The procedural postures of the consolidated case ranged from appellants who had not even filed their appellate briefs to appellants whose appeals had been decided,

but at least seven different aggravators were at issue, in some cases singly and in others in combination. By allowing the filing of only one brief, and the argument of only one lawyer – and that a lawyer totally unfamiliar and incapable of becoming familiar with the specific facts and legal issues pertinent to most of the appellants' crucial arguments – it was impossible for the court to be adequately informed on the issues before it. This precluded an application of law to the facts of an individual's case.

The reality of the consolidation orders was this: regardless of which counsel attempted the impossible task of effectively drafting and filing the brief, no counsel could be selected who represented a client on every issue involved. Thus, of necessity, on numerous issues, clients did not receive the critical ingredient of undivided loyalty and diligent and zealous advocacy to which each was entitled. Yet, given that this was the only brief the court considered on behalf of Respondent on these life and death issues, his counsel had no alternative but to include Respondent on the brief despite serious concerns about arguments and facts included in, and omitted from, the brief.

The conflict was magnified at oral argument. The court allowed one forty-five minute argument by one counsel on the varying issues, only a few of which affected all Appellants and most of which affected only some, but not other, Appellants. Although any oral argument requires counsel to choose what issues on which to focus, this case presented additional, insurmountable obstacles to the counsel who attempted to represent all of the Appellants, including those whose best interests diverged from arguing counsel's client.[13]

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and remanded by this Court after certiorari review.

[13]For example, legal and arguing counsel's client, Timothy Ring, was convicted of one, and only one, aggravating factor: pecuniary gain. Respondent was convicted of two aggravating factors: prior conviction and pecuniary gain. Mr. Ring's case, then, did not even present several issues critical to Respondent: 1) whether prior conviction aggravating factors are exempt from *Ring II*; 2) whether a finding of one aggravating factor which arguably does not violate *Ring II* ends a court's inquiry; and 3) whether the pecuniary gain finding by a judge can ever be harmless.

Arguing counsel had an obligation to select issues to argue that would not harm his client or any other appellant in the consolidated group. Of course, that could not be done. Even if it could, counsel would necessarily have violated his duty of loyalty and zealous representation to the individual client to represent only the client's interests, and not serve two, much less thirty, other masters with varying and conflicting interests. See *Glasser v. United States*, 315 U.S. 60, 75 (1942). In the final analysis, the consolidation procedure allowed no appellant to receive what the constitution requires: an effective counsel who "play[s] the role of an active advocate, rather than a mere friend of the court," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), and who observes a duty of "zealous and loyal representation," *Nix v. Whiteside*, 475 U.S. 157, 188 (1986). And the most insidious element of the harm is that it is most apparent in what is not apparent at all, hidden from view by the sin of omission. As this Court explained in *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978): "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), this Court explained that a fair trial depended upon adversarial testing, and that adversarial testing in turn depended upon effective counsel:

> **That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.**

Id. This Court also defined what counsel was expected to bring to the court on behalf of his client:

> **Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process**.

Id. at 688. Here, by asking one lawyer to write and speak on behalf of all thirty-one, the court promoted precisely the opposite: conflicted counsel was put into a position where he could not advocate any single appellant's cause, and was placed under restrictions of time and space so that he could not utilize his skill and knowledge on behalf of each appellant. Unable to advance arguments that reflected effective counsel to each appellant, his representation of all was *per se* ineffective.

These concerns are no less vital on appeal. *Penson v. Ohio*, 488 U.S. 75, 86-88 (1988). It is the responsibility of the appellate court to ensure that counsel's representation "be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States*, 315 U.S. at 70. *See also, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Kennedy, J., dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests."). The conflict and its consequences were presented repeatedly to the court, which in turn ignored the conflict, presumptively undermining the adversarial process. *Mickens v. Taylor*, 122 S.Ct. 1237, 1241-1242 (2002)(*quoting Holloway*, 435 U.S. at 488, 490 (1978) ("The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively seal his

lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors."); *see also Glasser*, 315 U.S. at 71 ("instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.") A certiorari grant which might result in a remand to the Arizona Supreme Court should address this issue of whether Respondent was denied his right to counsel on appeal due to the conflict.

CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, and because the disposition of the case Petitioner challenges is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the Petition For Writ of Certiorari should be denied. If the Petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

RESPECTFULLY SUBMITTED this 22nd day of September.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

Rebecca A. McLean
Attorney for Respondent

John F. Palumbo
Attorney for Respondent

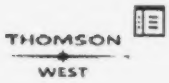
APPENDIX A

AZ LEGIS 255 (2003)

ARIZONA 2003 LEGISLATIVE SERVICE First Regular Session of the Forty-Sixth • • •

CHAPTER 255

Approved by the Governor, May 26, 2003. (Approx. 7 pages)



2003 Ariz. Legis. Serv. Ch. 255 (S.B. 1267) (WEST)

ARIZONA 2003 LEGISLATIVE SERVICE
First Regular Session of the Forty-Sixth Legislature
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Additions are indicated by **Text**; deletions by ~~Text~~. Changes in tables are made but not highlighted.

CHAPTER 255
S.B. 1267
CRIMES

AN ACT AMENDING SECTIONS 13-703 AND 13-703.01, ARIZONA REVISED STATUTES; AMENDING SECTION 13-703.01, ARIZONA REVISED STATUTES, AS AMENDED BY THIS ACT; REPEALING SECTION 13-4426, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 40, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-4426 AND 13- 4426.01; RELATING TO CRIMES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-703, Arizona Revised Statutes, is amended to read:

<< AZ ST § **13-703** >>

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

A. ~~A person guilty~~ **If the state has filed a notice of intent to seek the death penalty and the defendant is convicted** of first degree murder as defined in section 13-1105 ~~shall suffer~~, **the defendant shall be sentenced to** death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13-703.01. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age.
B. At the aggravation phase of the sentencing proceeding that is held pursuant to section 13-703.01, the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials. The burden of establishing the existence of any of the aggravating circumstances set forth in subsection F of this section is on the prosecution. The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.
C. At the penalty phase of the sentencing proceeding that is held pursuant to section 13-703.01, the prosecution or the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.
D. Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt. The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to

present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.
E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.
F. The trier of fact shall consider the following aggravating circumstances **in determining whether to impose a sentence of death:**
1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant **has been or** was previously convicted of a serious offense, whether preparatory or completed. **Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.**
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while:
(a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
(b) On probation for a felony offense.
8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, that were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
G. The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.
H. For the purposes of this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:
1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.

6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

Sec. 2. Section 13-703.01, Arizona Revised Statutes, is amended to read:

<< AZ ST § **13-703.**01 >>

§ 13-703.01. Sentences of death, life imprisonment or natural life; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death **in accordance with the procedures provided in this section**. If **the trier of fact determines that a sentence of death is not appropriate, or if** the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-703, subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.
N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.
O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.
P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.
Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
2. Shall consider the aggravating and mitigating circumstances listed in section 13-702 and any statement made by a victim.
~~Q.~~ **R.** Subject to the provisions of section 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.
~~R.~~ **S.** For the purposes of this section:
1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.
2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.
Sec. 3. Section 13-703.01, Arizona Revised Statutes, as amended by section 2 of this act, is amended to read:

<< AZ ST § **13-703.**01 >>

§ 13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death in accordance with the procedures provided in this section. If the trier of fact determines that a sentence of death is not appropriate, or if the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-703, subsection F.
C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.
D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.
E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.
F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.
G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.
H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.
I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.
J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.
N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.
P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.
Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
2. Shall consider the aggravating and mitigating circumstances listed in section 13-702 and any statement made by a victim.
R. Subject to the provisions of section 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present ~~and to present information~~ at the penalty phase. At the penalty phase, the victim ~~may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact~~ **has the right to be heard pursuant to section 13-4426**.
S. For the purposes of this section:
1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.
2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.
Sec. 4. Repeal

<< Repealed: AZ ST § 13-4426 >>

Section 13-4426, Arizona Revised Statutes, is repealed.
Sec. 5. Title 13, chapter 40, Arizona Revised Statutes, is amended by adding a new section 13-4426, to read:

<< AZ ST § 13-4426 >>

§ 13-4426. Sentencing

Notwithstanding any other law or rule, as an exercise of the victim's constitutional right to be heard at sentencing, before the imposition of sentence the victim in any case may address the sentencing authority and present any information or opinions that concern the victim or the victim's family, including the impact of the crime on the victim, the harm caused by the crime, the criminal offense, the defendant, the need for restitution or the sentence to be imposed at every sentencing or disposition proceeding.
Sec. 6. Title 13, chapter 40, Arizona Revised Statutes, is amended by adding section 13-4426.01, to read:

<< AZ ST § 13-4426.01 >>

§ 13-4426.01. Sentencing; victims' right to be heard

In any proceeding in which the victim has the right to be heard pursuant to article II, section 2.1, Constitution of Arizona, or this chapter, the victim's right to be heard is exercised not as a witness, the victim's statement is not subject to disclosure to the state or the defendant or submission to the court and the victim is not subject to cross-examination. The state and the defense shall be afforded the opportunity to explain, support or deny the victim's statement.

<< Note: AZ ST § **13-703** >>

Sec. 7. Intent

A. The Legislature reaffirms its action in Laws 2002, fifth special session, chapter 1, in which the Legislature eliminated the statutory prohibition on considering a victim's sentencing recommendation in a capital case. The Legislature reaffirms that, under the Constitution and statutes of Arizona, victims in capital cases have the right to make recommendations regarding the appropriate sentence, in the same manner as defendants, and that the only thing that stands in the way of exercising this right is the lack of a decision by the Arizona supreme court or the supreme court of the United States affirming this right.

B. The Legislature enacts sections 3, 4 and 5 of this act pursuant to its authority as prescribed by article II, section 2.1, subsection A, paragraph 11 and subsection D, Constitution of Arizona.

Sec. 8. Conditional enactment

A. The following do not become effective unless on or before June 30, 2013 the Arizona supreme court or the supreme court of the United States rules that it is constitutional for a crime victim in a capital case to make a sentencing recommendation:

<< Note: AZ ST § **13-703.**01 >>

1. Section 13-703.01, Arizona Revised Statutes, as amended by section 3 of this act.

2. Section 4 of this act.

<< Note: AZ ST § 13-4426 >>

3. Section 13-4426, Arizona Revised Statutes, as added by this act.

B. The attorney general shall notify in writing the director of the Arizona legislative council of the date on which the condition is met or if the condition is not met.

Approved by the Governor, May 26, 2003.

Filed in the Office of the Secretary of State, May 27, 2003.

AZ LEGIS 255 (2003)
END OF DOCUMENT

Copr. (C) West 2003 No Claim to Orig. U.S. Govt. Works

APPENDIX B

JUN 10 2003

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
June 5, 2003 (12:03 p.m.)
By: V. Freeland / cg

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. HOWARD FELL

CASE NO. **CR-61684**

COURT REPORTER: NONE

DATE: June 5, 2003

STATE OF ARIZONA

VS.

KEITH ROYAL PHILLIPS

MINUTE ENTRY

UNDER ADVISEMENT RULING ON PETITION FOR POST-CONVICTION RELIEF:

Petitioner, KEITH ROYAL PHILLIPS, was charged with one count of Armed Robbery with a Deadly Weapon or Dangerous Instrument, one count of Aggravated Assault with a Deadly Weapon or Dangerous Instrument, and one count of Kidnapping. All three charges arose from a robbery that occurred at the Silver Room on April 26, 1998. Petitioner was tried and convicted by a jury on all three counts charged. On October 8, 1998, Petitioner was sentenced to the presumptive term of 10.5 years for Counts One and Three and 7.5 years for Count Two, with the sentences to run concurrently. At the same time that Petitioner was facing charges for the Silver Room robbery he was also awaiting trial on charges stemming from three other robberies. Petitioner ultimately received a death sentence in the other case.

Petitioner appealed his conviction in the instant case on the grounds that the jury instructions were defective. On June 24, 1999, the Court of Appeals affirmed the conviction. In April of 2001, Petitioner filed a Petition for Post-Conviction Relief. This Court denied relief on September 9, 2001. Petitioner filed a Petition for Review and on November 13, 2002, the Court of Appeals granted relief. An evidentiary hearing was held on May 19, 2003. At the evidentiary hearing testimony was presented

Vicki Freeland / cg
Deputy Clerk

concerning trial counsel's failure to interview Jessica Phillips and present her testimony to support an alibi defense, the circumstances surrounding Petitioner's decision not to testify and trial counsel's failure to introduce expert testimony concerning eyewitness identification to support the defense of misidentification.

> In discussing trial counsel's failure to interview Ms. Phillips the Court of Appeals stated:
> It is true that "disagreements as to trial strategy or errors in trial tactics will not support an [in]effectiveness claim so long as the challenged conduct could have [had] some reasoned basis" State v. Meeker, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). The key here, however, is counsel's failure to gather the underlying information necessary to make "a calculated and informed decision" not to call Jessica to testify, when he had not contacted or interviewed her to determine what she had to say or what kind of witness she would make...We are troubled not only by counsel's failure to interview Jessica but by his apparent failure to list her as a witness in pretrial disclosure after having noted in the prehearing conference statement that Phillips was asserting an alibi defense.

State v. Phillips, 2CA-CR 2002-0030-PR, pp. 4-5 (Memorandum Decision, Nov. 13, 2002).

At the evidentiary hearing trial counsel did not provide an adequate explanation for his failure to interview Ms. Phillips. Trial counsel asserted that he did not believe Ms. Phillips would be a credible witness because she was the Petitioner's wife. However, if this logic were sound, an alibi defense would rarely be viable. The nature of an alibi defense, for the most part, requires that someone who knows the defendant testify as to the defendant's whereabouts at the time the crime occurred. If such a witness were automatically discounted simply because of their relationship with the defendant, no alibi witness would ever need to be interviewed. The Arizona Supreme Court essentially rejected this line of thinking in State v. Tapia, 151 Ariz. 62, 725 P.2d 1096 (1986), by holding that trial counsel's failure to interview and call the defendant's girlfriend and father as alibi witnesses constituted ineffective assistance of

counsel. Id. at 65, 725 P.2d at 1099.

At the evidentiary hearing Ms. Phillips was an articulate, sympathetic and believable witness who likely would have bolstered the Petitioner's case had she testified at his original trial. The fact that, years after the crime occurred, Ms. Phillips confused the actual dates does not have any bearing on her credibility. Ms. Philips made it clear that, at the time she heard about the crime, she knew that Petitioner had been with her and could not have committed the crime. Furthermore, to this day she remembers that he was with her the night of the Silver Spoon robbery because that was the last night they spent together since he was arrested the next day involving his other charges. Thus,

THE COURT FINDS that trial counsel denied the Petitioner his sixth amendment right to the effective assistance of counsel when he failed to interview Ms. Phillips prior to trial and failed to call her as an alibi witness. Id.

At the evidentiary hearing Petitioner testified that he had told trial counsel from the beginning of his representation that he was innocent, that he wanted to testify and that his wife could verify his alibi. Petitioner testified that trial counsel told him that he would face perjury charges if he testified and was convicted and that those charges would be used to support a death sentence in his other case. Petitioner further testified that, since trial counsel refused to call Ms. Phillips, he believed that his testimony would be worthless because it would be uncorroborated. Trial counsel testified that he had told the Petitioner early on that he did not think it would be a good idea for Petitioner to testify. Trial counsel admitted that he told Petitioner about the possibility of a perjury charge and that he was not going to allow the Petitioner to testify if there was any way to convince him otherwise. Trial counsel testified that, had the Petitioner persisted in his desire to testify, trial counsel would have asked for a recess and called Petitioner's attorneys in his capital case to try to convince Petitioner not to testify. This was not necessary however, because as trial counsel put it, after a heated discussion, Petitioner acquiesced and agreed not to testify.

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The ultimate decision whether to testify was Petitioner's to make after receiving accurate legal advice. It is clear from the testimony elicited at the evidentiary hearing that the Petitioner was given erroneous legal advice concerning the consequences of his testimony, that Petitioner insisted on testifying, and that it was only after receiving the inaccurate legal advice and realizing that trial counsel had failed to call Ms. Phillips as a witness that the Petitioner acquiesced to trial counsel's advice and agreed not to testify. The State argues that, since Petitioner admitted that the fact that Ms. Phillips had not been called as a witness influenced his decision not to testify, trial counsel was not ineffective. This argument is not persuasive because, as stated above, trial counsel was ineffective for his handling of Ms. Phillip's possible testimony and such ineffectiveness does not negate his ineffectiveness with regard to the Petitioner's decision not to testify, it only compounds it. Thus,

THE COURT FINDS that trial counsel denied the Petitioner his constitutional right to testify in his own behalf by providing him with inaccurate legal advice.

After hearing the evidence presented at the evidentiary hearing concerning an expert identification witness,

THE COURT FURTHER FINDS that trial counsel was not ineffective for failing to call an expert identification witness.

As the Court of Appeals noted:

> [E]very defendant is constitutionally entitled to the presumption of innocence, and a defense lawyer too firmly convinced of his or her client's guilt before trial may not mount the same energetic defense the lawyer would present on behalf of a client believed to be innocent and wrongly accused....Whether counsel's emphatic and unquestioned belief in his client's guilt might thus have compromised Phillip's defense is a question for the trial court to resolve at

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an evidentiary hearing."

State v. Phillips, 2CA-CR 2002-0030-PR, pp. 7-9 (Memorandum Decision, Nov. 13, 2002).

After hearing the evidence presented at the evidentiary hearing and weighing the credibility of the witnesses,

THE COURT FINDS that trial counsel's conviction that his client was guilty colored counsel's tactical and strategic decisions.

THE COURT FURTHER FINDS that trial counsel was ineffective for failing to interview Jessica Phillips and for giving the Petitioner inaccurate advice concerning his decision whether or not to testify.

IT IS ORDERED that the Petitioner's Petition for Post-Conviction Relief is granted, the trial can not be relied on as having produced a just result. Thus,

IT IS FURTHER ORDERED that the Judgment of Guilt and Sentence of October 8, 1998, is hereby vacated and set aside.

IT IS FURTHER ORDERED that this matter is scheduled for a Status Conference on June 23, 2003, at 10:30 a.m. in Division SR.

Howard Fell
HON. HOWARD FELL

cc:
Hon. Howard Fell
Criminal Calendaring
County Attorney - Baird Greene
Public Defender - John Palumbo
Clerk of Court - Under Advisement Clerk
Sheriff - 1 certified
DOC - 1 certified
Indigent Legal Services

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